78287-3

NO. 78287-3

SUPREME COURT OF THE STATE OF WASHINGTON

PLANET EARTH FOUNDATION, JOHN KEITH BLUME, JR. and LISA BLUME,

Plaintiff/Appellants,

v.

GULF UNDERWRITERS INSURANCE COMPANY and AMERICAN BUSINESS & PERSONAL INSURANCE, INC.,

Defendant/Respondents.

REPLY IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Gulf's opposition to the petition for review reflects the insurer's justified concern with respect to the conflict between the decision below and the same court's recent decision in Woo v. Fireman's Fund Insurance Co., 128 Wn. App. 95, 114 P.3d 681 (2005). Planet Earth contends that the Court of Appeals' decision here was wrong on the merits, but for present purposes the more important question is whether that decision is inconsistent with prior appellate decisions and thereby creates uncertainty as to the scope of the terms "professional services" as it is used in insurance policies issued to thousands of Washington businesses. The answer is yes; the decision below in fact is inconsistent with Woo.

Gulf cannot justify the Court of Appeals' failure to address (much less its failure to reconcile) the decision in Woo, 128 Wn. App. 95, or its failure to apply correctly fundamental rules of insurance contract interpretation. In Woo, the Court of Appeals, interpreting a coverage grant, recognized that a professional's misconduct does not arise from "professional services" when such conduct is not logically dependent on the services expected from such a professional. This is the case even in circumstances where the misconduct is directed at clients, takes place in a professional setting, and is accomplished using the skills, expertise and tools of the professional's trade.

Here, because the term "professional services" is found in a coverage exclusion, it must be interpreted even more narrowly. NYU's complaint against Planet Earth and the Blumes alleged trademark infringement, unfair competition and fraud—claims that do not depend on the services Planet Earth contracted to perform for NYU.

Given that: (a) underlying complaints must be interpreted liberally in favor of an insurer's duty to defend; and (b) at the very least, the "professional services" exclusion is ambiguous and therefore must be interpreted in favor of Planet Earth, the Court of Appeals incorrectly held that the "professional services" exclusion applied to all allegations in the underlying action. The Court of Appeals' decision here cannot be reconciled with Woo, Washington appellate law regarding interpretation of insurance contracts, or Washington appellate law regarding an insurer's duty to defend.

II. ARGUMENT

A. Woo Conflicts with the Decision Below.

Gulf and the Court of Appeals fail to distinguish between claims of misconduct that arise out of "professional services" and claims of misconduct that are simply collateral to the actual "professional services." Pursuant to Woo, the latter are covered while the former are not. The allegations against Planet Earth are the latter.

In Woo, 128 Wn. App. at 98, the dentist who placed the boar's teeth in his patients mouth as a prank did so during a routine dental procedure while the patient was under anesthesia. The dentist argued for coverage under a dental professional liability policy that provided coverage for damages "that result for rendering or failing to render dental services." Woo, 128 Wn. App. at 99. "Dental services" were defined in the policy as "all services which are performed in the practice of the dentistry profession. . . ." Id.

The dentist argued that the claim against him arose out his rendering "dental services" because he could not have accomplished the prank without his dentistry skills and equipment—"one cannot take molds, fabricate and insert flippers into another person's mouth without practicing dentistry." Id. at 104. The court rejected this line of reasoning:

> Albert's complaint does not allege that she was injured by the professional services that Dr. Woo actually rendered—that is, the administration of the anesthesia, the removal of the baby teeth, or the placement of the proper flippers. Neither does she contend that she was injured because he failed to perform some professional service that she was expecting. Instead, she alleges injuries arising from his action in taking advantage of her anesthetized state to place boar tusks in her mouth solely for the purpose of taking humiliating pictures.

Id. (emphasis added). The court concluded that "when he placed the boar tusks in her mouth and took pictures, he was not rendering professional services." Id. at 103.

Similarly here, the trademark infringement and unfair competition claims against Planet Earth are allegations of misconduct merely collateral to the services Planet Earth provided to NYU under the contract. When Planet Earth was allegedly infringing upon NYU's trademark and engaging in unfair competition, it "was not rendering professional services."

Moreover, Gulf's reliance on the Woo court's brief discussion of the fact that the insurer had also denied general liability coverage to the dentist is misplaced. Response at 11-12. Indeed, the court's discussion of the general-liability portion of the policy supports Planet Earth's position. The court held that the personal-injury coverage grant (providing coverage for "personal injury caused by an offense arising out of your business") under the general-liability section of the policy did not apply because the dentist's misconduct was not incidental to providing professional dental services. Woo, 128 Wn. App. at 107-08.

Gulf's discussion of the general-liability portion of the policy in Woo is an attempt to sidestep a fundamental tenet of Washington coverage law: undefined terms in a policy found in an inclusionary provision

should be interpreted liberally to provide coverage, whereas exclusionary provisions are construed strictly against the insurer. See, e.g., American States Ins. Co. v. Rancho San Marco Props., 123 Wn. App. 205, 212, 97 P.3d 775 (2004); Ross v. State Farm Mut. Auto. Ins. Co., 132 Wn.2d 507, 523, 940 P.2d 252 (1997). There can be no argument that the term "professional services," when used in an exclusion (such as in the case at bar), should be interpreted more strictly than when it is used in a coverage grant (as in Woo). Woo, therefore, sets the broadest possible interpretation of the term. Even under this broad interpretation, the exclusion does not apply. It certainly would not apply under a narrower interpretation.

At the very least, the term "professional services" is ambiguous. An insurance policy is ambiguous when it is "fairly susceptible to two different interpretations, both of which are reasonable." Lynott v. Nat'l Union Fire Ins., 123 Wn.2d 678, 690, 871 P.2d 146 (1994). Thus, to oust Planet Earth from coverage, it is insufficient to apply a broad, coverage-defeating interpretation of the term "professional services" even if such an interpretation is plausible or even reasonable. Planet Earth's position must be unreasonable. Given the decision in Woo and the definition of professional services found in RCW 18.100.030(1), Gulf does not, and cannot, meet this burden.

B. The Washington Legislature's Definition of "Professional Services" is Evidence that the Term is, At the Least, Ambiguous.

Gulf protests that Planet Earth cannot refer to the legislature's definition of "professional services" because it did not do so in the trial court. Response at 17. Gulf's position is not supported by RAP 2.5(a). Although, under this rule, a party generally may not raise a claim of error that was not raised in the trial court, it is not precluded from citation and discussion of different authority in support of its allegation of error. Here, Planet Earth did allege error below in the trial court's interpretation of the term "professional services." Planet Earth also asserted in the trial court that the term was ambiguous. Planet Earth only cites and discusses RCW 18.100.030(1) as support for this position. Refusing to permit this argument would be the equivalent of not permitting a party to cite different case law in its appeal brief in support of the allegation of error made below.

Further, although it is true that Planet Earth is not asserting that the Court of Appeals' decision regarding the inapplicability of the statute, by itself, is in conflict with another decision, this is irrelevant. Planet Earth is arguing that the definition of "professional services" employed by the Court of Appeals here is in conflict with Woo. This is, in part, because

the court here did not find the term ambiguous. RCW 18.100.030(1) supports the argument that the term is ambiguous.

RCW 18.100.030(1), which defines "professional services" in relevant part as "any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization..." is evidence of the ambiguity of the phrase "professional services." Planet Earth does not claim that the statute is an insurance statute. Rather, the fact that the legislature has so defined the term, in whatever context, is evidence that Gulf's interpretation is not the only reasonable interpretation. As such, the term is ambiguous and must be resolved in favor of coverage.

C. Allegations of Fraud, Trademark Infringement, and Unfair Competition Do Not Depend on Rendering of Professional Services.

Gulf argues that the numerous other cases from other jurisdictions which hold that collateral misconduct does not arise from "professional services" are inapposite because in those cases there was a separate duty of reasonable care, aside from their professional duties, which the policyholders were alleged to have breached. Gulf claims that "but for the professional services that Planet Earth was providing, there is no basis for Planet Earth's alleged liability to NYU." Response at 15.

The claims against Planet Earth include claims that do not arise out of the alleged "professional services" rendered by Planet Earth or even out of the contract between Planet Earth and NYU. It is irrefutable, for example, that Planet Earth's alleged conduct which gave rise to the allegation of fraud occurred prior to the formation of the contract between NYU and Planet Earth and prior to the rendering of any alleged "professional services." CP 160-63, 199-202. Moreover, Planet Earth could have misappropriated NYU's trademark or engaged in unfair competition regardless of whether it had a contract with NYU or whether it provided professional services to NYU. Just as with the failure-to-warn cases, the claims against Planet Earth are not tied to the specific professional services rendered, but instead arise out the common law duties to not engage in fraud or unfair competition and statutory prohibitions against trademark infringement.

The fact that NYU had a contract with Planet Earth at the time of the alleged trademark infringement and unfair competition does not alter this analysis, just as the fact that the patient in Woo was obtaining dental services at the time of the intentional tort against her did not alter the Court of Appeals' analysis.

D. The Court of Appeals' Decision is in Conflict with Well Established Washington Law Regarding an Insurer's Duty to Defend.

The Court of Appeals' decision holding that there was no duty to defend is in conflict with the following well accepted principles of Washington law:

- If the underlying complaint is "subject to an interpretation that creates a duty to defend, the insurer must comply with that duty." APA-The Engineered Wood Ass'n v. Glens Falls Ins. Co., 94 Wn. App. 556, 562, 972 P.2d 937, 940 (1999) (emphasis added);
- The duty to defend arises at the time an action is first brought, and is based on the potential for liability. Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (emphasis added); and
- "Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its duty to defend." Id. (emphasis added).

NYU's allegations and claims against Planet Earth, quoted extensively by Gulf in its Response, do, at a minimum, raise the "potential for liability" under the Policy. For example, NYU alleged that:

> Unbeknownst to NYU at the time, on September 16, 2002, Keith Blume, on behalf of Planet Earth, signed an "Intent to Use" trademark application with the United States Patent and Trademark Office to register as a trademark "Caring About Our Kids" in International Class 35.

Response at 6 (quoting C.P. 696 to 698). This alone should have triggered Gulf's duty to defend; the allegation on face of the Complaint cannot be said to be "clearly not covered."

It is irrelevant for the duty to defend analysis that NYU also alleged breach of contract, and that a large part of the underlying complaint detailed the alleged facts supporting this claim. Under Washington Supreme Court and Court of Appeals authority cited above, the only relevant inquiry is whether the complaint is subject to "an interpretation" that establishes the "potential for liability." The trademark infringement claim, as well as the fraud and unfair competition claims, do exactly that.

E. The Court of Appeals' Decision is in Conflict With Well Established Washington Law Requiring Insurers to Draft Clear Exclusions to Coverage.

It is basic Washington law that, if an insurer wishes to rely on an exclusion to deny coverage, its burden is to draft the exclusion in "clear and unmistakable language." Dairyland Ins. Co. v. Ward, 883 Wn.2d 353, 359, 517 P.2d 966 (1974); accord Boeing v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 887, 784 P.2d 507 (1990). Gulf did not do so here, yet the

Court of Appeals ignored this requirement. The court adopted a rule that basically would exclude from coverage any claim asserted by a client against a service provider. This holding makes the coverage offered by the policy illusory and, as such, violates the law requiring clear exclusions to coverage. As noted in the opening brief, and contrary to Gulf's assertion, this is a clear basis on which grant review pursuant to RAP 13.4(b) (1) (2) and (4).

III. CONCLUSION

If insurance companies do not follow established law in performance of their duties to their policyholders, then directors, officers and entities, non profit and for profit, are vulnerable to any wrongful allegations without resources for defense that can harm or devastate their capacities and harm the economic and social interests involved, which effects the public interest substantially.

This Court should accept review for the reasons set forth above and in the Petition for Discretionary Review, and should reverse the decision of the Court of Appeals.

DATED this 17th day of February, 2006.

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